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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 278

AARON D. FRANK,

Appellant,

v.

STATE OF MARYLAND,

Appellee.

APPEAL FROM THE CRIMINAL COURT OF BALTIMORE, STATE OF MARYLAND

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

OPINION BELOW

Although no opinion was delivered by the Court below, similar questions have previously been decided by the Maryland Court of Appeals in *Givner v. State*, 210 Md. 484, 124 A. 2d 764.

QUESTION PRESENTED

Was the inspection sought to be made of the Appellant's premises by a Health Inspector of Baltimore City without a search warrant, pursuant to the Baltimore City Code, such an unreasonable search as is prohibited by the Fourth or Fourteenth Amendment of the Constitution of the United States?

CONSTITUTIONAL PROVISIONS AND ORDINANCE INVOLVED

The Fourth Amendment to the Constitution of the United States provides (1 U.S.C., 1952 Edition, XLIV):

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

The Fourteenth Amendment to the Constitution of the United States provides, in part (1 U.S.C., 1952 Edition, XLV):

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Baltimore City Code (1950 Edition), Article 12, Section 120, provided on the dates involved in this case and now provides (page 56 (fol. 106) of pamphlet opposite R. 36):

> "120. Whenever the Commissioner of Health shall have cause to suspect that a nuisance exists in any house, cellar or enclosure, he may demand entry therein in the day time, and if the owner or occupier shall refuse or delay to open the same and admit a free examination, he shall forfeit and pay over for every such refusal the sum of Twenty Dollars."

STATEMENT

This is an appeal from the Criminal Court of Baltimore (Maryland) after certiorari had been denied by the Court of Appeals of Maryland. The Appellant was convicted of refusing to allow a health inspector to enter his house in the daytime for the purpose of inspecting his house for a suspected health nuisance and sentenced under Section 120 of Article 12 of the Baltimore City Code (1950 Edition) to pay a fine of Twenty Dollars ($20.00).

The facts as set forth in the Appellant's brief, pages 4-8, are substantially correct and, therefore, are adopted by the Appellee.

SUMMARY OF ARGUMENT

A Baltimore City Health Inspector, acting under the health article of the City Code, is lawfully entitled to enter and inspect the Appellant's residence without violating the provisions of the Fourth or Fourteenth Amendments to the Constitution of the United States.

The protection, privilege or immunity against unreasonable searches guaranteed to the Appellant by the Fourth Amendment applies only to Federal agents and officials and not to State or City agents and officials. *Barron v. Baltimore*, 7 Peters 243, 8 L. Ed. 672; *Twining v. New Jersey*, 211 U.S. 78, 53 L. Ed. 97.

However, it has been stated that a State may not affirmatively sanction an unlawful search and seizure without violating the Due Process Clause of the Fourteenth Amendment. *Wolf v. Colorado*, 338 U.S. 25, 93 L. Ed. 1782.

The question is whether the intended inspection was unlawful. It is clear that prohibitions against unreasonable searches and seizures do not prohibit reasonable

searches and seizures. *United States v. Rabinowitz*, 339 U.S. 56, 94 L. Ed. 653.

Historically, the abuses which gave rise to constitutional provisions against unreasonable searches and seizures grew out of searches for evidence to be used in criminal prosecutions. The historical background of the constitutional provisions may throw some light on what would constitute an unreasonable search if made without a warrant.

True, the privacy of the home of an individual is invaded by an inspection by the City Health Inspector but the privacy of the individual must be weighed against the protection of the health and safety of the public.

It is the Appellee's position that the exercise of police power in this case was such as was reasonable and necessary to protect the public health, safety and welfare.

The attempted inspection of the Appellant's property was in response to a complaint which was registered as to the presence of rats in a neighbor's house. The health inspectors, following their usual practice, commenced an inspection of the neighboring houses and Appellant's house happened to be in the block.

It is to be noted that all of the inspections authorized by the ordinance are to be made at reasonable hours, and there is no suggestion that any of the inspections are to be used as a cover to conduct a search for any violations of the criminal law or for any purpose other than the preservation of health and safety.

There is serious doubt as to whether, under the circumstances of this case, a search warrant is obtainable in Maryland, which of itself would not prove that a search warrant is unnecessary. However, it does tend to support the rather restricted common law concept of the office of

a search warrant, which presumably was in mind at the time of the adoption of the Federal constitutional provisions with regard to searches and seizures. Even if a warrant were provided, in the overwhelming majority of instances it would be impossible for the health inspector to make any showing of probable cause.

It is submitted that, on the facts, on the basis of the ordinance involved, in light of the established practices as to the enforcement of the ordinance in Baltimore, and the necessity involved, the inspections are of a routine nature made at reasonable hours, and are primarily for protective, not punitive, purposes. Such inspections, it is submitted, are not unreasonable, and hence are not unlawful. Since they are not unlawful, they do not involve any violation of the Fourteenth Amendment.

ARGUMENT

A Baltimore City Health Inspector, Acting Under the Health Article of the City Code, is Lawfully Entitled to Enter and Inspect the Appellant's Residence Without Violating the Provisions of the Fourth or Fourteenth Amendments to the Constitution of the United States.

A. The Fourth Amendment does not apply to State and City Officials or Agents.

The protection, privilege or immunity guaranteed to the Appellant by the Fourth Amendment to the Constitution of the United States against unreasonable searches applies only to Federal agents and officials and not to State and City agents and officials. This Court has consistently so held. *Barron v. Baltimore*, 7 Peters 243, 8 L. Ed. 672; *Weeks v. United States*, 232 U.S. 383, 58 L. Ed. 652; *Burdau v. McDowell*, 256 U.S. 465, 65 L. Ed. 1048; *Twining v. New Jersey*, 211 U.S. 78, 53 L. Ed. 97; *Adamson v. California*, 332 U.S.

46, 91 L. Ed. 1903; *Maxwell v. Dow*, 176 U.S. 581, 44 L. Ed. 597; *Wolf v. Colorado*, 338 U.S. 25, 93 L. Ed. 1782.

In *Barron v. Baltimore*, 7 Peters 243, 8 L. Ed. 672, decided in 1833, the plaintiff sued the City to recover damages for injuries to his wharf. The City, in adopting new grades for streets, had diverted certain streams of water and these streams deposited debris in front of plaintiff's wharf and rendered the water in front of plaintiff's wharf shallow. The plaintiff maintained that this act of the City was repugnant to the Fifth Amendment to the Constitution of the United States which declares that "private property shall not be taken for public use without just compensation". The plaintiff contended that the Fifth Amendment regulated the legislation of the States for the protection of people in each and all of the States regarded as citizens of the United States, or as inhabitants subject to the laws of the union.

Chief Justice John Marshall, in dismissing the case for lack of Federal jurisdiction, made the following comments on the rights of United States citizens at page 247:

> "The question, thus presented, is, we think, of great importance, but not of much difficulty.
>
> The Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual States. Each State established a constitution for itself, and in that constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily applicable to the govern-

ment created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes. * * *

We are of opinion that the provision in the Fifth Amendment of the Constitution, declaring that private property shall not be taken for public use without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the States."

The language of the Fourteenth Amendment to the Federal Constitution that "no state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law" does not operate as shorthand for the first eight amendments of the Constitution and does not thereby incorporate them. *Twining v. New Jersey*, 211 U.S. 78, 53 L. Ed. 97; *Palko v. Connecticut*, 302 U.S. 319, 82 L. Ed. 288; *Adamson v. California*, 332 U.S. 46, 91 L. Ed. 1903; *Wolf v. Colorado*, 338 U.S. 25, 93 L. Ed. 1782.

In *Twining v. New Jersey*, 211 U.S. 78, 53 L. Ed. 97, this Court held that the action of a State infringing the right safeguarded by the Fifth Amendment relating to self-incrimination was not prohibited by the Fourteenth Amendment as being a denial of due process and that the exemption from compulsory self-incrimination is not a privilege or immunity of national citizenship guaranteed by the Fourteenth Amendment against abridgment by the States.

This Court, in the *Palko* case, 302 U.S. 319, 82 L. Ed. 288, held that a conviction in a State court of murder in the first degree on a second trial of a criminal prosecution, after a conviction of murder in the second degree had been

set aside on appeal taken by the State, was not in derogation of any privileges or immunities that belong to the accused as a citizen of the United States in violation of the Fourtenth Amendment, and also that the Due Process Clause of the Fourteenth Amendment was not violated.

In the *Adamson* case, 332 U.S. 46, 91 L. Ed. 1903, this Court held that the clause of the Fifth Amendment protecting a person against being compelled to be a witness against himself is not made effective by the Fourteenth Amendment as a protection against State action on the ground that freedom from testimonial compulsion is a right of national citizenship or because it is a personal privilege or immunity secured by the Federal Constitution as one of the rights of man that are listed in the Bill of Rights.

Lower Federal Courts have held that the right of people under the Fourth Amendment to be secure in their persons, houses, papers and effects relates only to Federal action and is not one of the "privileges and immunities" of citizens of the United States which the Fourteenth Amendment forbids the States to abridge. *Atterberry v. Fortson* (1956), 230 F. 2d 604 (C.A. 5); *Mackey v. Chandler* (1957), 152 F. Supp. 579 (W.D. S.C.).

In the *Wolf* case, 338 U.S. 25, 93 L. Ed. 1785, Mr. Justice Frankfurter said at p. 26:

> "The notion that the 'Due Process of Law' guaranteed by the 14th Amendment is shorthand for the first eight amendments of the Constitution and thereby incorporates them, has been rejected by this court again and again, after impressive consideration. * * * the issue is closed."

Although the holding was narrowly confined to stating that "in a prosecution in a state court for a state crime, the 14th Amendment does not forbid the admission of evidence

obtained by an unreasonable search and seizure", in the course of his opinion, Mr. Justice Frankfurter said at page 26 of 338 U.S.:

> "For purposes of ascertaining the restrictions which the Due Process Clause imposed upon the states in the *enforcement of their criminal law,* we adhere to the views expressed in *Palko v. Connecticut, supra.* * * * In rejecting the suggestion that the Due Process Clause incorporated the original Bill of Rights, Mr. Justice Cardozo reaffirmed on behalf of that court a different but deeper and more pervasive conception of the Due Process Clause. This Clause exacts from the states for the lowliest and most outcast all that is 'implicit in the concept of ordered liberty'. * * * The security of one's privacy against arbitrary intrusion by the police — which is at the core of the 14th Amendment — is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the states through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English speaking peoples. Accordingly, we have no hesitation in saying that were a state affirmatively to sanction such police incursion into privacy, it would run counter to the guarantee of the 14th Amendment." (Emphasis supplied.)

Relying upon the propositions, the plaintiff in *Stefanelli v. Minard* (1951), 342 U.S. 117, 96 L. Ed. 138, brought suit in a Federal Court for an injunction to prevent the fruit of an unlawful search by New Jersey police from being used in evidence in a forthcoming State criminal trial, proceeding on the theory that the illegal search deprived him of rights, privileges or immunities secured by the

Federal Constitution. This Court, in an opinion by Mr. Justice Frankfurter, reaffirmed the rule "that the security of one's privacy against arbitrary intrusion by the police, which is at the core of the Fourth Amendment, is basic to a free society and that were a State affirmatively to sanction such police incursion into privacy, it would run counter to the guarantee of the Fourteenth Amendment", but denied relief on the ground that Federal Courts should refuse to intervene in State criminal proceedings to suppress the use of evidence even when claimed to have been secured by unlawful search and seizure.

It is therefore submitted that the Fourth Amendment is solely a limitation on the exercise of power of the government of the United States and is not applicable to action by the States.

B. THE INSPECTION AS AUTHORIZED DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The rule as stated by this Court in *Wolf v. Colorado*, 338 U.S. 25, 93 L. Ed. 1782, is that a State may not affirmatively sanction an unlawful search and seizure without violating the Due Process Clause of the Fourteenth Amendment. The question in this case then is whether the intended inspection was unlawful. In the *Wolf* case, *supra*, this Court adhered to the doctrine that the Fourteenth Amendment was not "shorthand for the first eight amendments of the Constitution" and, therefore, does not incorporate them but stated that the security of one's privacy against arbitrary intrusion by the police is basic to a free society, therefore implicit in "the concept of ordered liberty" and as such is enforceable against the States through the Due Process Clause.

It is, however, clear that prohibitions against *unreasonable* searches and seizures do not prohibit *reasonable* searches and seizures. *United States v. Rabinowitz*, 339 U.S. 56, 94 L. Ed. 653.

The question of what is a reasonable search cannot be answered by any fixed formula as the Constitution does not define what are "unreasonable" searches. Each case is to be decided on its own facts and circumstances. *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 75 L. Ed. 374; *Harris v. United States*, 331 U.S. 145, 91 L. Ed. 1399. Historically, the abuses which give rise to constitutional provisions against unreasonable searches and seizures grew out of searches for evidence to be used in criminal prosecutions. The origin of prohibitions against unlawful searches and seizures date back to the Writ of Assistance in England issued by the Star Chamber, under command of which the King's messengers entered any place they desired and searched for and seized any papers and evidence which they chose. The validity of this action came before the English courts in the case of *Entick v. Carrington*, 2 Wils. 275, 95 Eng. Reprint 807, 19 Howell St. Tr. 1029, where Lord Camden held that general warrants were invalid. The same principle was adopted following the issuance of the crown of writs of assistance in the American Colonies primarily in Massachusetts, where a noteworthy trial occurred in Boston in 1761, in which James Otis, one of the counsel for the defendants, made a lasting argument against the use of such general writs. See *Boyd v. United States*, 116 U.S. 616, 29 L. Ed. 746.

Referring to the Fourth Amendment, Story, in his *Commentaries on the Constitution of the United States*, Section 1902, says: "its introduction into the amendments was doubtless occasioned by the strong sensibility excited, both in England and America, upon the subject of general warrants almost upon the eve of the American Revolution."

In light of the background of the Fourth Amendment, Judge Holtzoff, in his dissenting opinion in *District of Columbia v. Little*, 85 U.S. App. D.C. 242, 178 F. 2d 13, said:

> "The Fourth Amendment was intended and is to be construed to apply only to criminal prosecutions and proceedings of a quasi-criminal nature for the enforcement of penalties. Its purpose is to limit and regulate searches conducted with a view to discovering and seizing books, papers, and objects to be used as evidence in a criminal proceeding or in an action for the enforcement of a penalty; and to protect any person against the use of evidence in a criminal or penal proceeding, if it has been procured from him by an unreasonable search and seizure. It does not affect the administration of law if criminal prosecutions or suits for penalties are not involved. It does not apply to inspections, if no seizure is intended."

Thus, this Court, in *Murray v. Hoboken Land and Improvement Co.*, 18 How. 272, 15 L. Ed. 332, held unanimously that the limitations of the Fourth Amendment did not apply to distress warrants for the collection of taxes.

In *United States v. 62 Packages, etc.*, 48 F. Supp. 878, 884, aff. 142 F. 2d 107 (C.C.A. 7), it was stated that "the Fourth Amendment to the United States Constitution does not apply to a seizure process in civil actions".

Camden County Beverage Co. v. Blair, 46 F. 2d 648 (D.N.J. 1930), was a case where prohibition agents broke and entered the plant of the complainant and seized certain evidence. The Court felt that this evidence was only to be used to revoke complainant's license, a thing strictly civil in nature, and, therefore, was not within the Fourth or Fifth Amendments.

Boyd v. United States, 116 U.S. 616, 634, 29 L. Ed. 746, involved the application of the Fourth Amendment to

certain custom laws. In that case, the Court made the following observations:

> "As, therefore, suits for penalties and forfeitures, incurred by the commission of offenses against the law, are of this quasi criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the fourth amendment of the constitution, and of that portion of the fifth amendment which declares that no person shall be compelled in any criminal case to be a witness against himself; * * *."

We are unable to find any reported case that extends the scope of the Fourth Amendment to fields other than criminal or quasi-criminal law or enforcement of penalties except the *Little* case, 85 U.S. App. D.C. 242, 178 F. 2d 13.

Cornelius on *Searches and Seizures*, 2nd Ed., Section 35, states:

> "The constitutional provision in question, while primarily designed to protect the individual in the sanctity of his home and in the privacy of his books, papers and property, does not apply to reasonable rules and regulations adopted in the exercise of the police power for the protection of the public health, morals and welfare."

Then he cites some examples of reasonable inspection laws relating to pawnbrokers and food dealers. The inspection of inns or hotels and institutions is upheld. *Hubbell v. Higgins*, 148 Ia. 36, 126 N.W. 914; *Sister Felicitas v. Hartridge*, 148 Ga. 832, 98 S.E. 538.

In *Simms v. Liuzza*, 168 La. 714, 123 So. 301, the Louisiana Court said:

> "Plaintiff contests the right of the state fire marshall to order ex parte the demolition of Liuzza's building. In *Zibilich v. Rouseo*, 166 La. 547, 117 So. 586, we said

that:

"'Section 5 of Act No. 26 of 1914 empowers the fire marshall or his authorized representative, upon complaint of any person having an interest in any building or property adjacent, and without any such complaint, to enter into and upon all buildings at all reasonable hours for the purpose of examination, and whenever any building or other structure which, for want of proper repair, or by reason of age and delapidated condition, or for any cause, is especially liable to fire, the said fire marshall or his representative shall order the same to be removed or remedied, and such order shall be forthwith complied with by the owner or occupant of the said building.'

"The fire marshall, therefore was vested with the power under the law to inspect the building in question for the purpose of determining its condition with respect of its liability to fire, and, if he found such to be the fact, to order the owner to demolish the structure."

The Appellant cites and relies upon the case of *District of Columbia v. Little*, 62 A. 2d 874 (Ct. of Mun. App. D.C.), aff. 178 F. 2d 13, 13 A.L.R. 2d 954, 85 U.S. App. D.C. 244, aff. 339 U.S. 1, 94 L. Ed. 599. The Municipal Court of Appeals reversed on constitutional grounds the conviction of Little on a charge that she had interfered with a health officer of the District of Columbia in his duty of inspecting her house.

The facts were that a health officer, in response to a complaint, went to Little's house to investigate. The health officer, who did not have a search warrant, requested Mrs. Little to allow him in her house to inspect the premises. She protested his right to enter her house and refused to unlock the door for him. She neither used nor threatened force of any kind. The Court of Appeals for the District of Columbia affirmed the judgment of the Court of Municipal Appeals by a 2-1 decision, in which both the majority and the minority proceeded entirely on constitutional grounds.

On *certiorari*, a majority of the Supreme Court, in an opinion by Mr. Justice Black, affirmed the judgment of the Court of Appeals on the ground that her "mere refusal to unlock the door accompanied by remonstrances on substantial constitutional grounds was" not "the kind of interference prohibited by the (District of Columbia health) regulations" upon which the prosecution was based. The majority found it unnecessary to consider the constitutional question of whether or not the Fourth Amendment prohibited the health officer from inspecting the premises without a search warrant. Mr. Justice Burton, with whom Mr. Justice Reed agreed, dissented on the factual question and disagreed with the Court of Appeals on the constitutional question. Mr. Justice Burton said in the dissenting opinion:

> "* * * In my opinion, also, the duties which the inspector was seeking to perform, under the authority of the District, were of such a reasonable, general, routine, accepted and important character, in the protection of the public health and safety, that they were being performed lawfully without such a search warrant as is required by the Fourth Amendment to protect the right of the people to be secure in their persons, house, papers and effects against unreasonable searches and seizures.
>
> "Accordingly, the conviction of the respondent should be sustained, and the judgment of the United States Court of Appeals affirming the judgment of the Municipal Court of Appeals setting aside that conviction should be reversed."

The majority opinion in the Court of Appeals of the District of Columbia holds that the Fourth Amendment prohibits the search of a home by a health officer of the District without a search warrant. The minority opinion in that Court takes the view that the requirements for

search warrants are applicable only in criminal cases, and that the object of a health department inspection is essentially a civil matter, to which any criminal prosecution is only incidental.

The majority opinion of this Court (at 339 U.S. 2-6) states in part:

> "In this Court the constitutional arguments have extended far beyond the comparatively narrow issues involved in the particular case. At one extreme the District argues that the Fourth Amendment has no application whatever to inspections and investigations made by health officers; that to preserve the public health, officers may without judicial warrants enter premises, public buildings and private residences at any reasonable hour, with or without the owner's consent. At the opposite extreme, it is argued that no sanitary inspection can ever be made by health officers without a search warrant, except with a property owner's consent. Between these two extremes are suggestions that the Fourth Amendment requires search warrants to inspect premises where the object of inspections is to obtain evidence for criminal punishment or where there are conditions imminently dangerous to life and health, but that municipalities and other governing agencies may lawfully provide for general routine inspections at reasonable hours without search warrants. An impressive array of facts is also presented concerning the uniform practices of agencies of local governments to provide for such general routine inspections in connection with sanitation, plumbing, building, etc.
>
> "Neither the facts of this case, nor the District law on which the prosecution rests, provide a basis for a sweeping determination of the Fourth Amendment's application to all these varied types of investigations, inspections and searches. Yet a decision of the constitutional requirement for a search in this particular case might have far reaching and unexpected impli-

> cations as to closely related questions not now before us. This is therefore an appropriate case in which to apply our sound general policy against deciding constitutional questions if the record permits final disposition of a cause on non-constitutional grounds. * * *"

It is true that there are many cases to the effect that a search of a home without a search warrant, otherwise than as an incident to a lawful arrest, is unlawful. See *Agnello v. United States*, 269 U.S. 20, 70 L. Ed. 145; *Harris v. United States*, 331 U.S. 145, 91 L. Ed. 1399. These cases, however, dealt with criminal prosecutions only and therefore would not be conclusive in this case.

It is the Appellee's position that the exercise of police power in this case was such as was reasonable and necessary to protect the public health, safety and welfare.

The inspection by the health inspector is in the exercise of the "police power". This was recognized in the majority opinion of the United States Court of Appeals for the District of Columbia in the *Little* case, 85 U.S. App. D.C. 242, 178 F. 2d 13, 13 A.L.R. 2d 954.

There is in the present case an instance of a collision between a constitutional provision, the Fourteenth Amendment, and an exercise of the "police power" when used in the sense of that inherent power of the State exercised to preserve the public health.

The Fourteenth Amendment can no more be considered a privilege to conceal upon private premises filth which directly endangers the health of the community, than can the First Amendment be considered a privilege to arise in a crowded theatre and cry "Fire". *Schenck v. United States*, 249 U.S. 47, 63 L. Ed. 470.

It would appear evident, from a consideration of the results which can flow from the existence and accumulation of filth, garbage, rodents, etc., that the minimum activity which is necessary to discover and abate such condition is a reasonable exercise of the police power.

In *Nebbia v. New York*, 291 U.S. 502, 524, 78 L. Ed. 940, this Court in upholding the conviction of a storekeeper for selling milk at a price below that allowed by an order promulgated by a State board, pursuant to a statutory authority, held respecting the exercise of the police power:

> "* * * Touching the matters committed to it by the Constitution, the United States possesses the power, as do the states in their sovereign capacity touching all subjects jurisdiction of which is not surrendered to the federal government, as shown by the quotations above given. These correlative rights, that of the citizens to exercise exclusive dominion over property and freely to contract about his affairs, and that of the state to regulate the use of property and the conduct of business, are always on collision. No exercise of the private right can be imagined which will not in some respect, however slight, affect the public; no exercise of the legislative prerogative to regulate the conduct of the citizen which will not to some extent abridge his liberty or affect his property. But subject only to constitutional restraint the private right must yield to the public need.
>
> "The Fifth Amendment in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regula-

tion valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts."

In numerous other cases, the Supreme Court has held that the particular constitutional provision invoked either did not apply, or that the police power exercised was a proper limitation upon the right granted by the constitutional provision. *Mugler v. Kansas*, 123 U.S. 623, 31 L. Ed. 205; *Lawton v. Steele*, 152 U.S. 133, 38 L. Ed. 385; *District of Columbia v. Brooke*, 214 U.S. 138, 53 L. Ed. 941; *Calhoun v. Massie*, 253 U.S. 170, 64 L. Ed. 834; *Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80, 90 L. Ed. 1096.

No one doubts the validity of protecting the right of privacy. It is not a right, however, which is inviolate in modern living. Freedom of speech is limited by the prohibition against publication of obscene material and against the creation of public disorder. Likewise, the right of freedom of religion does not permit acts that are regarded as illegal, immoral or offensive. In the same way, the right of privacy is not absolute but is and should be subject to certain limitations. It is not disputed that a representative of the fire department requires no search warrant to enter a house in order to extinguish a fire, even if the owner objects to his presence. Likewise, in most cases a representative of the Health Department may enter a home if one of its inhabitants is afflicted with a serious contagious disease and that disease would menace the community as a whole. It is also proper for public authorities to enter a home to suppress a nuisance, such as persons disturbing the peace of the neighborhood. These are all assaults upon our privacy which we accept as part of the price of living in a complex society. To say that we will accept these in-

vasions, but can bar the entry of inspectors who enter for the purpose of protecting the public health, is to fail to balance the conflicting rights in accordance with their relative weight. The entrance of the health inspector in the case at bar was for the protection of the homeowner as well as the rest of the community.

No exercise of a private right can be imagined which will not in some respect, however slight, affect the public. The Fourteenth Amendment, as respects State action, does not prohibit governmental regulation for public welfare; it merely conditions the exercise of the power by requiring that governmental regulation be consistent with due process. The guarantee of due process demands, in general terms, that the legislation be reasonable in the light of existing facts. In determining this reasonableness the court must evaluate the relative weights of the beneficial consequences which will follow, and the price which must be paid for them in the form of the resulting deprivation of liberty or freedom.

The choice in the instant case is between the interest of privacy and the interest of preserving the lives and health of the citizens of the City of Baltimore. The object of the entry in this case is for the purpose of discovering and abating nuisances, rather than for the purpose of securing evidence upon which to procure the conviction and punishment of a crime.

The duties of the Health Department to protect public health hardly require any reference but it may be worth mentioning the preamble to Ordinance No. 1543, which was passed by the Baltimore City Council (1950-1951) establishing the Housing Bureau of the Health Department. This preamble reads as follows:

> "Whereas, a major objective of the Mayor and City Council of Baltimore is to combat successfully slum

and blighted areas and prevent their future growth and

"Whereas, experience in the City of Baltimore has demonstrated that slum and blighted areas result in large measure from improper maintenance of dwellings, inadequate sanitation, overcrowding of dwellings and general community neglect in these areas and

"Whereas, experience has also shown that through well-planned and vigorous enforcement of minimum housing standards for safety, sanitation, population density and public health, these conditions can be relieved and prevented and

"Whereas, there has been developed in the City of Baltimore a municipal effort, known as 'The Baltimore Plan', for combating residential blight by vigorous housing law enforcement, which program requires for its maximum effectiveness:

(a) Aggressive enforcement of housing ordinances and regulations through the efforts of several of the departments of the City and the utilization of their several enforcement procedures.

(b) Compelling compliance with said ordinances and regulationse both in response to complaints and also at the initiative of the City on an area basis.

(c) Centralization in a single office of responsibility for assisting the several city departments involved in housing law enforcement in establishing policies, procedures and techniques which will assure uniform and consistent enforcement, and also for assisting these departments in planning their separate programs to avoid duplications, overlaps and conflicts, and to integrate the housing law enforcement effort with the programs of the Housing Authority of Baltimore City and the Baltimore Redevelopment Commission into an effective campaign against slum and blighted areas and

"Whereas, the Board of Estimates, prior to the adoption of this ordinance, has recommended the creation

> of an additional bureau in the Department of Health, to be known as the Housing Bureau, in order to meet the requirements of 'The Baltimore Plan' program hereinbefore recited * * *" (R. 94).

The attempted inspection of the Appellant's property was in response to a complaint which had been registered as to the presence of rats in a neighbor's house. The health inspectors, following their usual practice, commenced an inspection of the neighboring houses and Appellant's house happened to be in the block. The inspector viewed the yard and the exterior of Appellant's house and the inspector testified he saw trash, rodent feces and undue debris (R. 9). This we believe would be sufficient to satisfy the requirements of Section 120 of Article 12 of the Baltimore City Code as to cause one to suspect the existence of a nuisance in the Appellant's house. The health inspector, after viewing this property, had cause to suspect that a nuisance existed, and it was then necessary to inspect the premises so that steps could be taken to avert such a nuisance.

It is to be noted that all of the inspections authorized by the ordinance are to be made at reasonable hours. There is no suggestion that any of the inspections are to be used as a cover to conduct a search for any violations of the criminal law or for any purpose other than the preservation of health and safety. There is no suggestion of harassment by repeated inspections.

As was stated previously, the problem here is one of personal privacy as against the protection of the public health. The protection of the public health is the objective of the inspection in the present case. In the usual course of procedure, if violations of the health code are found, the property owner is informed of the violations and is ordered

to correct them within a stated period which is usually thirty days. If he fails to comply with such order, a prosecution is instituted for failure to do so.

Where there is reason to believe that a crime is being committed, but the circumstances are not such as to warrant an immediate arrest, and there is ample time to get a search warrant, the proper practice is to apply for such warrant to be issued under Article 27, Section 551 of the Annotated Code of Maryland (1957 Ed.). However, the search warrant statute just referred to is framed with a view to the detection of crime and as suggested in *Givner v. State*, 210 Md. 484, 124 A. 2d 764, there is serious doubt as to whether a search warrant is obtainable in Maryland except under a statute or to search for stolen goods or the like. This, of course, of itself, would not prove that a search warrant is unnecessary, but it does tend to support the rather restricted common law concept of the office of a search warrant which was probably in mind at the time of the adoption of the Federal constitutional provisions with regard to searches and seizures and search warrants. Even if a warrant were provided, in the overwhelming majority of instances it would be impossible for the health inspector to make any showing of probable cause. Therefore, the warrant would not be issued. This would have the practical effect of completely destroying the preventive powers of the Health departments.

Although the questions presented in this case have not been decided by this Court, but see *District of Columbia v. Little*, *supra*, similar cases have been before the State courts.

In Maryland, the Court of Appeals, in *Givner v. State*, 210 Md. 484, 124 A. 2d 764 (1956), held that the ordinances of Baltimore City which provided for inspections without

search warrants by the Health Department, Building Inspection Engineer and Fire Department of buildings for the purpose of performing their prescribed duties, were a valid exercise of the police power. The Court further held that the inspections were not unreasonable and hence were not unlawful; thus did not involve any violation of Article 26 of the Maryland Declaration of Rights (similar to the Fourth Amendment), nor the Fourteenth Amendment.

In South Carolina, the court in *Richards v. City of Columbia*, 227 S.C. 538, 88 S.E. 2d 683 (1955), upheld the constitutionality of an ordinance (with exception of certain provisions not pertinent here) directed at the improvement of housing, although regarding the question of entry upon premises, the majority opinion stated:

> "* * * this question is not presented in this litigation because there has been no entrance of any premises by the director over the objection of the occupant. * * * It may be added that there is doubt whether such an entrance would come within the constitutional guaranties against unreasonable searches."

The court then referred to the divided opinions in the United States Court of Appeals and in this Court in the *Little* case, *supra*.

In Ohio, the Supreme Court in *State v. Price*, 168 Ohio St. 123, 151 N.E. 2d 523, held that inviolability of a homeowner's "castle" is subordinate to the general health and safety of the community where he lives. The court further held that the Dayton ordinance, authorizing housing inspectors to enter upon premises and examine the premises at any reasonable hour was not violative of the Ohio Constitution section prohibiting unreasonable searches.

A recent note in 72 Harvard Law Review (January 1959) 504 discusses Urban Renewals: Problems of Elimi-

nating and Preventing Urban Deterioration. The article indicates that the enforcement of housing codes as well as the establishment of substantive standards have presented considerable difficulty. The problem of inspections is discussed and at page 546 suggests that authorization by municipal housing codes of entry upon property for inspection without a warrant may be open to question under the Fourteenth Amendment and State constitutional guaranties against unreasonable search and seizure. The note suggests at page 546:

> "* * * It seems, however, that courts should uphold housing-code inspections without warrants on the ground that the applicable constitutional provision was intended to require a warrant — except in cases of overriding emergency — only when the search is conducted for the purpose of securing evidence of criminal guilt, and that although criminal convictions may, ultimately result from inspections, the correction of conditions constituting a continuing violation of the code rather than the discovery of past guilt is the primary purpose of such inspections. Moreover, to the extent that the requirement of a warrant is designed to prevent intrusion upon private property without probable cause to suspect guilt, there is less need for a warrant in cases involving housing-code inspections, the justification for which may be unrelated to suspicion of guilt. It has also been argued that although the interest in privacy may be the same regardless of the purpose of a particular search, the need to conduct routine housing inspections, in regard to which probable cause for the issuance of a warrant could not ordinarily be established, outweighs the interest in privacy. Under either theory, a search for inspection purposes should be deemed unreasonable only if conducted in an oppressive way."

We submit that on the facts, on the basis of the ordinance involved, in light of the established practices as to the en-

forcement of the ordinance in Baltimore and the necessity involved, the inspections are of a routine nature made at reasonable hours and are primarily for protective, not punitive, purposes. Such inspections it is submitted are not unreasonable and hence are not unlawful. Since they are not unlawful, they do not involve any violation of the Fourteenth Amendment.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

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February 7, 1959.